> rejected, Yeager once again challenges GM's apprentice-hiring program. In case after case, including the cases involving Plaintiff Yeager, we have made it clear that a Title VII plaintiff challenging an affirmative action program must prove that but for the program, he would have been considered for the job. In light of that amply precedent, and in light of the undisputed fact that GM has not hired a non-seniority applicant to work as an apprentice at the Fab Plant since June of 2002, this appeal is patently frivolous."

Throughout, Appellant's "standing" argument has been premised on the "inability to compete on an equal footing" principle. Such has been and remains the "injury in fact" standing trigger for this Court and for the Eleventh Circuit Court of Appeals. Gratz, Fla. Gen. Contractors and Wooden, supra at I. The issue here presented is whether, as a matter of law, an appellate court argument may be found "frivolous," on "repeatedly rejected" grounds, where that same argument finds its genesis in the jurisprudence of this Court and of another circuit court of appeals.

Research reveals that this issue is not only a matter of first impression, but that this Court has addressed FRAP Rule 38 on just one occasion, in *Cooter & Gell v. Hartmarx Corp.*, 496 US 384, 110 L.Ed.2d 359 (1990), only to say that such rule, not the Federal Civil Rule 11, governs "frivolous" appeals. This case provides Court an opportunity to discuss FRAP Rule 38 in detail, teaching what "frivolous" means in the appellate court arena and defining the rule's "just damages and single or double costs" choice of words.

CONCLUSION

For these reasons, the Court should grant the Petition.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 04-3750

[Filed August 10, 2005]

LEE W. YEAGER;	)
PAUL T. SCHULER,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
GENERAL MOTORS	)
CORPORATION,	)
Defendant-Appellee.	)
	)

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiffs-Appellants Lee Yeager and Paul Schuler appeal the district court's order granting summary judgment in favor of Defendant-Appellee General Motors Corp. (GM) in this Title VII race discrimination case. Because Yeager and Schuler lack standing to bring this claim, we will AFFIRM the judgment of the district court. For the reasons that follow, we will GRANT GM's motion for costs and attorneys fees as to Yeager and DENY it as to Schuler.

I.

Yeager and Schuler are non-seniority (i.e., they are not employed by GM) white males who applied for positions as apprentices at GM's Lordstown Fabrication Plant (the Fab Plant) in June of 2002. Prior to filling positions in its apprentice training program at the Fab Plant, GM advertised the openings and solicited applications throughout the community. Interested persons were required to come to the plant and fill out a Request for Apprentice Information (RFI). GM then randomly drew 100 RFIs and extended the lucky applicants an offer to take the written apprentice exam. Candidates not selected through the random draw were not given further consideration. Because, historically, mostly white males had applied for and were placed in apprentice positions with GM, the Fab Plant undertook a targeted recruiting process in 2002, whereby 118 minority and female applicants who appeared to possess the necessary skills also were extended the opportunity to sit for the apprentice exam, but without going through the random draw process.

All 218 selected applicants were then permitted to take the identical written apprentice exam, which included mathematics and reading comprehension. Those candidates whose scores were average or above average (without regard to race or sex) were invited to proceed to the interview stage of the process while those whose scores were below average were removed from consideration. Neither Yeager nor Schuler proceeded to the interview phase: Yeager because his RFI was not selected in the random draw, and Schuler, because, although his RFI was randomly selected, his score on the apprentice exam was below average.

GM's collective bargaining agreement with the United Auto Workers labor union requires that for every two

seniority applicants offered apprenticeships, only one non-seniority applicant may be offered an apprenticeship. Pursuant to the terms of that agreement, GM keeps separate lists for seniority applicants and non-seniority applicants. The Fab Plant hired only 10 apprentices in 2002, and each of them had seniority status. Since June of 2002--when Yeager and Schuler applied for apprenticeship positions--the Fab Plant has hired no non-seniority apprentice applicants.

In January of 2004, Yeager and Schuler filed suit in federal district court alleging that GM denied them entrance into the apprenticeship program because of their race in violation of Title VII, 42 U.S.C. § 2000e-2. For Yeager, this is the third in a series of virtually identical federal lawsuits challenging the hiring practices of GM's apprenticeship program. *See Yeager v. GM Corp.*, 265 F.3d 389 (6th Cir. 2001) (*Yeager I*); *Yeager v. GM Corp.*, 67 Fed.Appx. 335 (6th Cir. 2003) (*Yeager II*). According to GM, this is Schuler's second such suit. The district court granted summary judgment in favor of GM on the ground that Yeager and Schuler lacked standing to bring a Title VII suit. Yeager and Schuler's timely appeal followed.

II.

We review a district court's grant of summary judgment de novo. *Williams v. Mehra,* 186 F.3d 685, 689 (6th Cir. 1999) (en banc). A motion for summary judgment should be granted only if the moving party show[s] that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The court must

take the nonmoving party's well-pleaded allegations as true. *Miree v. DeKalb County,* 433 U.S. 25, 27 n.2, 53 L. Ed. 2d 557, 97 S. Ct. 2490 (1977).

The doctrine of standing is an integral component of the case and controversy requirement of Article III of the Constitution. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Standing, therefore, is the threshold question in every federal case. *Warth v. Seldin,* 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975). In order to invoke federal jurisdiction, the party bringing suit bears the burden of establishing an injury-in-fact. *Lujan,* 504 U.S. at 561. As we stated in *Yeager I,* the relevant question for the purpose of assessing standing is whether Yeager would have been hired as an apprentice if he had been randomly selected. 265 F.3d at 397; *see also Brunet v. City of Columbus,* 1 F.3d 390, 397 (6th Cir. 1993) (in the context of affirmative action programs, the challenger need only show that, but for the program, he would have been considered for the job to satisfy standing requirements).[1] As

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[1] Yeager and Schuler argue that our inquiry on the question of standing is controlled by a statement in a footnote in *Regents of the Univ. of Calif. v. Bakke,* which said even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. 438 U.S. 265, 281 n.14, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978). But that footnote goes on to say that the constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. *Id.* (internal citations omitted). Ultimately, Yeager and Schuler could not compete for the apprenticeship positions, not because of their race, but because they were non-seniority applicants, a factor having

the district court correctly held, both Yeager and Schuler have failed to make this showing.

In 2002, GM hired only 10 apprentices to work at the Fab Plant. Each of these apprentices had seniority status. Since June of 2002, GM has not hired a single non-seniority apprentice applicant to work at the Fab Plant. Neither Schuler nor Yeager had seniority status at the Fab Plant. Neither of them, therefore, can demonstrate that, but for the recruiting program, he would have been considered for an apprenticeship position. Schuler, who took the written exam, did not score well enough on it to merit any further consideration. He complains that GM required white male candidates to take a more difficult written test than that taken by women and minorities. We find nothing in the record to call into question the district court's finding that the written examinations taken by all 218 candidates were identical, but even if there were any such evidence, Schuler ultimately was not eligible to be hired as an apprentice because he had no seniority status. Yeager also complains that the test administered to white males was more difficult than that administered to women and minorities, but, of course, Yeager did not take the test. And even if he had, he, like Schuler, was ineligible to be hired because there were no apprenticeship positions available for non-seniority applicants.

Finally, as we understand their complaint, Yeager and Schuler contend that the GM applicant lists continue in existence, although they may be augmented by new rounds of testing. GM's permitting certain female and minority applicants to take the exam without having to go through the random draw, the plaintiffs argue, decreases their own

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nothing to do with their race.

opportunities either to be selected to take the test or to score well enough on the test to proceed further in the process. This, in turn, they argue, constitutes an injury because in the future, GM may have openings for non-seniority apprentice candidates. This claim of injury is neither actual nor imminent. *See Lujan,* 504 U.S. at 560.

Neither Schuler nor Yeager has standing to bring a Title VII case against GM. Accordingly, we **AFFIRM** the district court's order granting summary judgment in favor of GM.

III.

GM has filed a motion asking us to award damages and double costs pursuant to FED. R. APP. P. 38, which provides if a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee. We have held that an appeal is frivolous when the result is obvious or when the appellant's argument is wholly without merit. *Allinder v. Inter-City Prods. Corp.,* 152 F.3d 544, 552 (6th Cir. 1998) (quotation omitted). An appellee does not have to demonstrate that the appellant or his attorneys acted in bad faith to succeed on a motion for sanctions. *Wilton Corp. v. Ashland Castings Corp.,* 188 F.3d 670, 677 (6th Cir. 1999) (imposing sanctions because the issue on appeal had been clearly resolved and the appellant's arguments essentially had no reasonable expectation of altering the district court's judgment based on law or fact). We may sanction an attorney who knows or reasonably should know that a claim pursued is frivolous, *Tareco Properties, Inc. v. Morriss,* 321 F.3d 545, 550 (6th Cir. 2003) (quotation omitted), and we have imposed sanctions jointly and severally on a client and his attorney when the attorney should have been aware of the frivolous

nature of his client's claim given that the exact issue raised on appeal was rejected by this court in a previous case. *See Raft v. Commissioner of Internal Revenue*, 2005 U.S. App. LEXIS 10281, No. 03-3566, 2005 WL 1385951 at *4 (6th Cir. June 1, 2005) (unpublished).

In *Yeager I*, Yeager, represented by the same counsel who represents him here, argued that he had standing to sue GM for employment discrimination when his name was not selected in the random drawing. We held that Yeager lacked standing because he would not have been hired as an apprentice even if he had been randomly selected. *Yeager I*, 265 F.3d at 397. When Yeager challenged GM's hiring process again in *Yeager II*, we dismissed his claim for want of standing and noted the instant case ... presents the same claim at issue in *Yeager I*, despite plaintiffs' attempts to rearticulate the claim in a different form. 67 Fed. Appx. at 338. As in *Yeager I*, we stated that Yeager lacked standing because he could not prove that he would have been selected as an apprentice but for GM's affirmative action measures. *Id.* Relying on the same recycled arguments that we have twice rejected, Yeager once again challenges GM's apprentice-hiring program. In case after case, including the cases involving Plaintiff Yeager, we have made it clear that a Title VII plaintiff challenging an affirmative action program must prove that but for the program, he would have been considered for the job. In light of that ample precedent, and in light of the undisputed fact that GM has not hired a non-seniority applicant to work as an apprentice at the Fab Plant since June of 2002, this appeal is patently frivolous. We therefore hold that costs and attorneys fees not to exceed $5,000 are to be imposed against Lee Yeager and his attorney, Michael D. Rossi, jointly and severally. We decline to impose costs and fees against Paul Schuler, because the record before us is insufficient to demonstrate that Schuler's

conduct in pursuing this appeal is similarly egregious. An itemized and verified bill for the costs and attorneys fees may be filed with the Clerk of this Court, with proof of service, within fourteen (14) days after entry of this order.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 4:04CV107

[May 26, 2004]

LEE W. YEAGER, et al.	)
Plaintiffs,	)
	)
v.	)
	)
GENERAL MOTORS	)
CORPORATION	)
Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

JUDGE PETER C. ECONOMUS

This matter is before the Court upon the Motion for Summary Judgment filed on behalf of the Defendant, General Motors Corporation (GM) on April 30, 2004 (Dkt. # 13). Plaintiffs filed their Memorandum Contra on May 11, 2004 (Dkt. # 15). In addition, on May 11, 2004, Plaintiffs filed a Motion to Strike Other than Standing Issues Raised in Defendant's Motion for Summary Judgment (Dkt. # 14). GM filed its reply brief on May 24, 2004 (Dkt. # 16).

At the case management conference conducted on March 30, 2004 (as well as in the planning report filed by the parties in preparation for the conference), counsel for GM expressed a strong conviction that Plaintiffs lack standing to assert the federal race and sex discrimination claims in this case. Accordingly, the Court ordered GM to file a motion for summary judgment on the issue of standing. To the extent that GM's motion addresses issues which have no relevance to the standing issue, Plaintiffs' Motion to Strike is GRANTED.

Facts

Plaintiffs are non-seniority white males who applied for positions in the apprenticeship program at GM's Lordstown Fabrication plant (the Fab plant) in June 2002. After Plaintiffs were denied entrance into the program, they filed the above-captioned case claiming that the were denied apprenticeship positions because of unlawful discrimination. For Plaintiff, Lee Yeager this is the third in a series of virtually identical federal lawsuits challenging the apprenticeship program at GM or Delphi Automotive Systems facilities. *See Yeager v. GM Corp.*, 265 F.3d 389 (6th Cir.2001)(Yeager I); *Yeager v. GM Corp.*, 67 Fed.Appx. 335 (6th Cir.2003)(Yeager II). The case *sub judice* is Plaintiff, Paul Schuler's second such lawsuit. *See Schuler v. GM Corp.*, 4:03CV238.

A brief review of the application process for the apprenticeship program and Yeager's prior lawsuits is relevant to the standing issue currently before this Court. In 2002, GM recruited persons into available skilled trades apprentice positions through locally administered apprentice programs, pursuant to the 1999 national collective bargaining agreement between GM and the International Union UAW. Declaration of Sophia Gray ¶ 3. Prior to filling positions in its apprentice training program at a particular plant, including the

Fab plant, GM published notices throughout the community and within the plant, explaining that it would be seeking applications for apprentice positions and indicating where and when interested persons may apply. GM also sought out interested and qualified minority and female applicants, usually through contact with local minority and female employment organizations. Gray Decl. at ¶ 4.

Persons seeking placement into the apprentice program were required to come to the GM plant or other designated location at a specific time and fill out a Request for Apprentice Information form (RFI). After all RFI's were received, GM sent them to an independent testing firm. The firm conducted a random draw of the RFI's, whereby a predesignated number of RFI's were drawn from those submitted. Those whose RFI's were drawn were offered the opportunity to take a written apprentice exam. Candidates not selected in the random draw were not considered further in the apprentice selection process. Gray Decl. ¶ 5.

Before accepting RFI's, Fab Plant management determined that 100 individuals would be selected through the random draw process to take the apprentice exam. Historically, mostly white males had applied for and were placed in apprentice positions at GM. Thus, to try to increase the apprentice exam applicant pool and attract more females and minorities to GM's apprentice training program, the Fab plant undertook a targeted recruiting process in 2002. This process was an effort to permit certain qualified female and minority individuals to sit for the apprentice exam without being part of the random draw. Gray Decl. ¶ 6.

To implement this process, during the application period in 2002, the Fab plant selected 118 minority and female individuals who appeared to possess the necessary skills to

succeed on the GM apprentice exam and in the interviews. The Fab plant permitted these persons to sit for the 2002 apprentice exam without going through the random draw process. The selection of targeted candidates had no effect on the pre-determined number of candidates (100) selected through the random draw to take the apprentice exam. The selection of targeted candidates increased the overall number of candidates taking the apprentice exam to 218. Gray Decl. ¶ 7.

These 218 persons were permitted to take an identical written apprentice exam. Written apprentice exam topics included mathematics and reading comprehension. The score each candidate earned on the exam was used to assess whether the candidate would be afforded an opportunity to interview, and was used to calculate rankings of apprentice candidates. Gray Decl. ¶ 8.

The exam scores of those selected in the random draw, as well as those who either had previously tested and transferred their scores or who were tested in 2002, were then considered. Individuals whose test scores fell at or above the national norm of all apprentice exam scores nationally (without regard to race or sex) were offered an opportunity to interview for the trades that they selected. Individuals were then scored on their performance during interviews, with maximum interview scores of 27. Gray Decl. ¶ 9.

In Yeager I, Yeager challenged a program at GM which permitted minority and female applicants to increase their total scores by participating in GM's Pre-Apprentice Training Program. The training program provided additional training to minority and female apprentice program candidates. Following their training, minority and female applicants were permitted to take a written test that may improve their total

score by up to seven points. However, the training program participants could not receive a total score exceeding the maximum possible score of seventy-two. After the training program's participants' test points were added to their total scores, the overall rankings are adjusted accordingly.

Yeager applied to the apprentice program at GM's Lordstown Assembly Plant in 1989. He took his first written exam in 1989 and was interviewed in 1990 for his selected

positions (Truck Repair, Tool Making, and Pipefitting). He attained his highest score, fifty-three, in Truck Repair. In 1991, four seniority positions and one nonseniority position in Truck Repair became available. However, the nonseniority position was filled by a white male with a score of sixty-eight, fifteen points higher than Yeager's score. In 1993, additional apprentices were selected, but no nonseniority positions were available in Truck Repair.

In 1996, Yeager exercised his option to retake the written exam and changed his Truck Repair preference to Millwright. After his interviews, Yeager achieved a total score of sixty in Millwright, fifty-seven in Tool Making, and fifty-five in Pipefitting. Later that year, GM selected apprentices for its Assembly Plant. Thirteen seniority and six nonseniority Millwright apprenticeships became available. Six seniority and three nonseniority Pipefitting apprenticeships became available. Three seniority and one nonseniority Tool Making apprenticeships became available. Yeager's total score placed him fourteenth among the nonseniority white males for MillWright, twenty-fourth for Pipefitting, and thirty-sixth for Tool Making. Ultimately, the top fifty candidates for the apprentice positions were all white males and Yeager was not among them. After the training program points were factored into the overall rankings, thirty-eight white males were

accepted into the apprentice program. Therefore, although women and minorities who had scores lower than Yeager's before they participated in the training program were selected for the apprenticeship program, he would not have selected even if no women or minorities were admitted in to the program.

In 1997, Yeager applied to the apprentice program at GM's Lordstown Fab Plant. The Fab Plant is a separate facility from the Assembly Plant and it has its own, separate, apprentice program. Applicants with a previous score at another GM facility were permitted to have their total score applied to the Fab Plant apprentice program, however were still required to go through the random selection process. Yeager was not randomly selected for the nonseniority applicant list and, therefore, his scores were not transferred.

This district court granted summary judgment in favor of GM on all counts. On appeal, Yeager argued that he had standing to challenge rejection by the apprenticeship program in 1991, 1996 and 1997. Yeager first argued that training program points awarded to minority and female apprentice candidates would adversely affect his future ranking. However, the Sixth Circuit affirmed this district court's finding that Yeager's potential injury was too speculative to satisfy Article III's standing requirements. *Id.* at 395.

The Sixth Circuit next rejected Yeager's discrimination claim based upon the 1996 apprenticeship program selections because GM hired fifty apprentices in 1996 and fifty candidates with higher *unadjusted* scores outranked Yeager in 1996. The Court stated, [R]egardless of the training program, Yeager would not have received an apprenticeship in 1996, and, therefore, [] no causal connection existed between GM's training program and Yeager's alleged injuries. *Id.*

Finally, the Sixth Circuit held that Yeager lacked standing to challenge the 1997 apprenticeship results because he would not have been selected even if his scores had been transferred to the Fab plant. Yeager received a score of 33 on the written exam. The Court theorized that even if Yeager received a perfect score on the interview, his total score would still be lower than the two nonseniority white male apprentices who were ultimately hired as Millrights in 1997.

In Yeager II, Yeager and his co-plaintiff, David Polonus alleged that GM; discriminated against them by failing to hire them into the apprenticeship program at the Packard Electric plant in 1995. Polonus also alleged that GMC discriminated against him by failing to hire him into the program at the Lordstown Assembly plant in 1996.

First, the Sixth Circuit affirmed the district court's finding that Yeager I was controlling as to Polonus's claim regarding the Lordstown assembly plant. Next, the Court concluded that neither Yeager nor Polonus had standing to challenge the Packard plant apprentice selections. Although neither plaintiff was selected by random draw, even if they had been selected, the Court reasoned that both were outranked by more white men than there were total spaces in the apprentice programs. *Id.* at 338.

With the foregoing case law in mind, the Court turns to the discrimination claim asserted in the case subjudice.

Standard of Review

Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (c). Rule 56 (c) mandates the entry of summary judgment, after adequate

time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In considering such a motion, the court must review all of the evidence in the record. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986)). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . .The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *accord Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 556-57 n.7 (6th Cir. 2000). The central issue is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-52.

A party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323 (quoting FED. R. CIV. P. 56 (c)). The movant meets this burden by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case. *Clayton v. Meijer, Inc.*, 281 F.3d 605, 609 (6th Cir. 2002) (quoting *Celotex*, 477 U.S. at 324-25). The non-movant then must set forth specific

facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 250.

The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.' *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 250). A mere scintilla of evidence is insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]. *Anderson*, 477 U.S. at 250.

Standing

The doctrine of standing is an essential and unchanging part of the case-or-controversy requirement of Article III, *Lujan v. Defenders & Wildlife*, 504 U.S. 555, 560 (1992), which itself defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. *Allen v. Wright*, 468 U.S. 737, 750, (1984). Plaintiffs bear the burden of demonstrating standing. *Coyne v. American Tobacco Co*, 183 F.3d 488,494 (6th Cir.1999).

To establish Article III standing, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *County of Riverside v. McLaughlin*, 500 U.S. 44, 51 49 (1991)(citation omitted). Three essential elements must be proven for a plaintiff to satisfy standing requirements: (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. *N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,*

Fla., 508 U.S. 656, 663-64 (1993). Plaintiffs contend that a Supreme Court opinion issued in 2003 has redefined standing requirements, and, therefore prevents the above-captioned case from suffering the same fate as Yeagers I and II. Plaintiffs, in a one and one-half Memorandum *Contra*, rely on the following block quote from *Gratz v. Bollinger*, 539 U.S. __, 156 L.Ed2d 257 (2003):

> In finding that no such showing [award of contract] was necessary, we explained that [t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit .... And in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of contract. (Authority omitted) We concluded that in the face of such a barrier, [t]o establish standing, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.(Authority omitted)

Id at 262.[2]

However, the foregoing block quote is from *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656 (1993), a Supreme Court case decided in 1993. As a matter of fact, the Sixth Circuit in both Yeager I and II cite to the *City of Jacksonville* case.

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[2] Plaintiffs, in their only citation to the Court, cite the wrong page of the opinion.

Furthermore, the Yeager I Court acknowledged that to show an injury in fact 'in he context of affirmative action programs, the challenger need only show that, but for the program, he would not have been considered for the job...' *Id.* at 389 (quoting *Brunet .City of Columbus*, 1 F.3d 390, 397 (6th Cir.1993). Further contradicting Plaintiffs' claim that the standing requirement is somehow different from the standard applied in Yeagers I and II, the *Brunet* Court states, in the text immediately following the text quoted by the Yeager I Court, The United States Supreme Court recently reaffirmed this *principle* in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, supra. Brunet*, 1 F.3d at 397 (emphasis added). Consequently, there is no question that the Court was cognizant of the Supreme Court's holding in *City of Jacksonville* when it delivered its opinion in *Yeager I.*

In the case *sub judice,* Yeager was not selected in the random draw. Although Schuler was selected in the random draw, his test score was not at or above the national norm, and, therefore, he was not interviewed or considered further for an apprentice position. Gray Decl. at ¶10. The Fab plant eventually hired apprentices in 2002, each of whom was a seniority candidate. Gray Decl. at ¶9.

GM contends that, because no non-seniority positions were filled in 2002, Plaintiffs do not have standing to challenge the application process. Plaintiffs counter that the Court may not look beyond the application process and determine that Plaintiffs would ultimately not have gotten the positions they sought, based upon the new law articulated in *Gratz v. Bollinger, supra.*

It is clear that *Gratz, supra.,* merely quotes pre-existing Supreme Court precedent, the same precedent cited by the

Sixth Circuit in both *Yeager I and II* Here, the apprenticeship positions were filled by seniority apprentices. Insofar as no non-seniority apprentices were hired, the proper causal connection between the application process and Plaintiffs' failure to be admitted into the program cannot be established. Moreover, the argument that at some point in the future such a non-seniority position will open and be filled is too speculative to demonstrate standing to challenge the apprenticeship program. *See Yeager*, 265 F.3d at 395. Accordingly, GM's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

/s/Peter C. Economus
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article III, Section 2, Clause 1:

Jurisdiction of Courts. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction; -to Controversies to which the Untied States shall be a Party; -to Controversies between two or more States; -between a State and Citizens of another State; -between Citizens of different States; -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 U.S.C. 2000e-2(a)

Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

APPENDIX D

AGREEMENT
Between General Motors Corporation and the UAW

September 18, 2003
[Effective October 6, 2003]

Doc. No. 60
PRE-APPRENTICE TRAINING

Mr. Richard Shoemaker
Vice President and Director
General Motors Department
International Union, UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214

Dear Mr. Shoemaker:

During the current negotiations the parties discussed pre-apprentice training as one method of achieving our common goal of bringing a greater number of members of minority groups and females into the apprentice training program. It is evident that we share a serious concern about the establishment of effective methods of achieving this desirable goal.

Accordingly, the GM-UAW Skilled Trades and Apprentice Committee, upon determining that a plant's skilled trades workforce is under-represented by minority groups and females, will consider matters pertaining to pre-apprentice

training as it relates to achieving the above objective as well as approve any such training program fro which points can be awarded under the GM-UAW Apprentice Selection Procedure.

Very truly yours,

Troy A. Clarke
Group Vice President
Manufacturing & Labor Relations